IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION No. 3108 OF 2002
AND
WRIT PETITION No. 1132 OF 2003

PARTIES IN WRIT PETITION No. 3108 OF 2002

1. Smt. Sunanda Hari Kadam,]
]
2. Ganesh Hari Kadam,]
both having their address]
at C/o. Kamgar Utkarsha]
Sabha, Rama Gulab Doshi]
Niwas, Parleshwar Road,Vile
Parle (E), Mumbai 400 057.]Petitioners

Vs.

Manisha Hospital,]
Sant Seva Marg, Byculla,]
Mumbai-400-027.] Respondent

Mr. A. H. Fatangare for petitioner.

PARTIES IN WRIT PETITION No. 1132 OF 2003

Manisha Hospital,]
A hospital registered under]
Bombay Public Trust Act,1950
having its office at Sant]
Savta Marg, Byculla,]
Bombay - 400 027.] Petitioner

Vs.

1. Sunanda Hari Kadam]

2. Ganesh Hari Kadam,]
the legal heirs of Mr. Hari]
G. Kadam, a deceased workman
of the petitioner.]
]
Both having their address at
C/o. Kamgar Utkarsha Sabha]
Rama Gulab Joshi Niwas,]

Parleshwar Road, Vile Parle]Respondents
Mumbai - 400 057.

Mr. S. S. Patil, for the petitioner.

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CORAM : S.U. KAMDAR, J.
DATE : MAY 4, 2006.

ORAL JUDGMENT :-

. Both these petitions are filed challenging the order passed by the Industrial Court in Revision Application (ULP) No. 43 of 2001, dated 18th March, 2002.

2. Some of the facts of the present case are as under-

. One Hari Ganpat Kadam was an employee of respondent hospital. He was appointed as Ward Boy since 1967 and had put in twenty years of service. The said worker was also a Union Leader and was actively participating in the Union Activities. The respondent no.1 charge sheeted the petitioner for charge of assaulting co-workers. He was suspended from service with effect from the date of charge sheet dated 26th June, 1987. After replies were filed, an

enquiry was conducted and ultimately he was dismissed from service on 10-10-1987. After his dismissal, said worker filed a complaint bearing Complaint (ULP) No. 283 of 1987 before the Labour Court under Item 1, Schedule IV of MRTU & PULP ACT. In part I award a finding was recorded by the Labour Court that the enquiry was not fair and proper and gave the management an opportunity to prove the charges before the court.

3. Being aggrieved by the said Part I award a Revision Application was preferred by the Respondent Management bearing Revision Application (ULP) 78 of 1994. Said Revision Application was rejected by the Industrial Court, by remanding the matter back to Labour Court for a fresh decision on the preliminary issue. Thereafter a Writ Petition was filed by the said worker being Writ Petition No. 1377 of 200 and by an order dated 6th July, 2000 this Court set aside the said order passed by the Industrial Court of remanding the matter back to the Labour Court and this Court directed that the respondent no.1 Management

should lead evidence and prove charge before the Labour Court.

4. Thereafter first respondent examined various witnesses in support their case before the Labour Court. After examining the said various witnesses, and after hearing the parties the Labour Court passed an order and judgment dated 3rd March, 2001, holding that the misconduct is not proved against the workman and directed that the said workman should be reinstated with continuity of service and full back wages. The Labour Court gave a finding that the charge of assault is not proved by the respondent Management, because no evidence of the doctor has been produced or medical report to show that there was any assault on the said co-workman. The Management has relied upon only oral evidence in support of their case and did not rely upon any documentary evidence except the complaint of co-worker. The said oral evidence of witnesses was disbelieved by the Labour Court, on the ground that though said co-worker is working in the hospital, where doctors are available all

24 hours, he did not take any medical treatment for injuries, but went to the private doctor Shri Gaikwad, and the said Gaikwad is neither examined, nor any documents are produced to show that he has taken any treatment from said Dr. Gaikwad. It is also observed by the Labour Court that the evidence of the said co-worker that he has taken medicine from Dr. Gaikwad for 3-4 days at Vikroli is not believable, when he was residing in the hospital during the said period. It has been further observed by the Labour Court that the evidence produced by Management of other Co-witnesses also does not inspire the confidence of the Court. The Labour Court has also not accepted the evidence of watchman as credible, because he has deposed in his evidence that there was assault in his presence, but he heard horn of the Car coming to the main Gate and therefore he went to open the said Gate. He has further deposed that when he came back, he found nobody on the scene and he thought that everything is sorted out, as both co-workers had left the said place. The Labour Court has analysed the evidence in

detail, of each of the witnesses and has come to the conclusion that the charge of assault has not been proved.

5. Being aggrieved by the said order, respondent filed Revision Application bearing Revision Application (ULP) No. 43 of 2001 before the Industrial Court and in exercise of revisional jurisdiction, the Industrial Court has come to the conclusion that the misconduct of the assault on the co-employee by the said workman has been proved and revision is partly allowed by setting aside the order of reinstatement. Further it is held that the punishment of dismissal is disproportionate but however since the said worker had expired during the pendency of the Revision Aplication in Court the Industrial Court directed respondent Management to pay wages at the rate of 50% and other legal dues and service emoluments to the legal heirs of the deceased worker.

6. It is this order, which has been challenged in both these Writ Petitions, while

the legal heirs of the workers have challenged the impugned order, contending that Revisional Authority has erred in re-appreciating the evidence on record and travelled beyond the jurisdiction vested in them under Section 44 of the MRTU and PULP Act, 1971. Whereas the respondents Management are challenging the said order by contending that Revision Authority ought not to have even granted 50% backwages and other dues having held that the misconduct of assault on co-employee has been proved. The learned counsel for the petitioner in Writ Petition No. 3108 of 2002, who are the legal heirs of deceased worker, has taken me through the judgment of the Industrial Court and has invited my attention to the paragraph 8 to 12 of the said judgment and contended that in fact Industrial Court has undertaken the exercise of re-examining and re-appreciating evidence on record. It has been contended that it is not open to the Revisional Court to re-appreciate the evidence while exercising the Revisional power. In support of the aforesaid contention, the learned counsel for the petitioner has relied upon judgment of the learned Single

Judge of this Court in Writ Petition No. 3004 of 2001, decided on 13th December, 2001. The learned counsel thereafter relied upon the judgment in case of **Vitthal Gatlu Marathe Vs. Maharashtra State Transport Corporation & Ors. reported in (1995 I CLR 854)** and judgment of the another learned Single Judge in the case of - **Pest Control (India) Pvt. Ltd. Vs. Pest Control (India) Pvt. Ltd., Employees' All India Union & Ors. reported in (1994 I CLR 230)**. It has been contended by relying upon the aforesaid judgments that it is a consistent view of this Court that the Revisional Court in exercise of powers under Section 44 of MRTU and PULP Act, 1971 is not entitled to re-appreciate the evidence, which was led before the Labour Court and come to a different conclusion and finding. It has been held by the aforesaid judgments, that the jurisdiction of Revisional Court is limited in interfering with the finding, i.e either finding is based on no evidence or there is a total perversity on the finding given by the Labour Court.

7. The learned counsel for the respondent

has on the other hand relied upon the judgment of the learned Single Judge in the case of G. S. Khairkar Vs. Camlin Limited, (1997 II CLR 1164) particularly in paragraph 7 thereof, which reads as under :-

> The evidence on record shows that the Petitioner was appointed as Assistant Security Officer. The evidence on record also shows that one of the persons amongst the other Asstt. Security supervisors was designated as security supervisor. However, the Manager sought to explain this by saying it was a mistake and that was subsequently corrected. The Petitioner chose not to step into the witness box. Therefore all the evidence on record is the evidence of the witness of the Respondent Company which includes the Administration Manager Shri S. P. Patil and another Assistant Security Supervisor Shri Subbarao Pandurang Patil. The nature of the work done by the Petitioner seems to be posting of the security guards, doing a round of the premises to find whether they are doing the job, filling in the attendance register of himself and others, being present at the place where loading of the goods is being done. It has also come on record that in respect of wage settlement, the Assistant Security Supervisors are not included in the said settlement and the wage hike or increase is given to them by the Management which is different from the settlement arived at in so far as the workers are concerned.

> Whether the Petitioner is doing any other work which is clerical in nature is not possible to be said from the material on record. In the absence of any evidence on the part of the Petitioner to displace the evidence led by the Employer it cannot be said that the Industrial Court was wrong in reversing the findings of the Labour Court and arriving at a conclusion it has arrived at. Normally, the revison Court cannot reappreciate the evidence. In the instant case, the Industrial Court has given reasons as to why it been reappreciated the evidence as a wrong test had been applied by the Labour Court. The approach of the Industrial Court cannot be said be contrary to law. In view of the above, there is no merit in this writ petition which is accordingly rejected.

8. The learned counsel for the respondent has further submitted that the judgment of the Labour Court is totally perverse and illegal and there is an error apparent on the face of the record, in as much as that the learned Labour Court has not taken into consideration the evidence which was relevant and has also ignored the material part of the evidence. He has produced before me compilation of documents, forming part of the record, particularly the document at Sr. no. 13, which was produced before the Industrial Court,

giving details why the observations and findings based on evidence record is perverse. In the said document the learned counsel for the respondent in fact analyse the evidence and gave details of findings as illustrative, exhaustive, contrary observations made in the order dated 3rd March, 2001 by the 12th Labour Court, Bombay. By relying upon the said analysis prepared by the respondent, the learned counsel has sought to argue that the findings are perverse and the Labour Court had ignored to take into consideration material part of the evidence.

9. The learned counsel has taken me through document at Sr. No. 13 and has undertaken the same exercise which was undertaken before the Industrial Court of re-appreciation of the evidence in as much as he has sought to point out that some part of the evidence, which has deliberately mis-read and some portion was deliberately ignored by the Labour Court. The learned counsel for the respondent/Hospital has contended that on the evidence, it is clear that the order of Labour

Court is unsustainable in law and therefore, the Industrial Court has rightly interfered with the said order. He has further submitted that after holding that the misconduct of the deceased workman has been proved, relief of grant of 50% of the backwages, till the time of his death and all terminal dues is unsustainable, and therefore the order passed by the Industrial Court be interferred with in Writ under Art. 226 of the Constitution of India and the same should be quashed and set aside.

10. Considering the rival contentions and arguments advanced before me by both the parties, I am of the opinion that the first question which is required to be determined is - whether the Revisional Court i.e. Industrial Court has exceeded its jurisdiction, while considering Revision Application. Perusal of the judgment dated 18th March, 2002, in my mind leave no manner of doubt that in fact the Revisional Court has re-assessed and re-considered the entire evidence which was before the Court and has come to the different

conclusion. The judgment from paragraph 8 to 12 which are main paragraphs, on the basis of which the findings of the Labour Court are reversed and a conclusion is arrived at that the Management has proved the misconduct is nothing else but total re-appreciation of oral evidence In paragraphs 10 and 11 the Industrial Court has re-considered the evidence of one of the witness Mukesh Misal. After reconsidering the said evidence, the finding of the Labour Court that there are contradictions in his evidence has been interfered with by holding that the evidence of Misal is considered from the angle of the criminal trial and not on the principle of departmental enquiry. He has further stated that because the deceased worker was present at the place and at a time when alleged assault supposed to have taken place, it is established that such an assault took place. In paragraph 11 of the said judgment, once again the oral evidence of the parties have been re-considered by the Industrial Court and held that in cross examination the evidence of Mr. Jagwal as a witness has not been shaken and therefore, the Court has wrongly held that

it does not inspire confidence. In my opinion the respondent Management by producing document Exh. 13 which contained the analysis of evidence which was led before trial Court has invited the Industrial court to embark upon the exercise of reappreciating of evidence which legally not permissible in limited revisional jurisdiction under S. 44 of the MRTU & PULP Act, 1971. The judgment cited by the learned counsel for the respondents in the case of G. S. Khairkar Vs. Camlin Limited (supra) also holds that revisional Court under Section 44 of MRTU & PULP Act 1971 cannot re-appreciate the evidence which was led before Labour Court. Further in that case, the Labour Court had applied wrong test and therefore, Industrial Court has interfered in the matter and the same was upheld by the High Court. In the present case, perusing the judgment of the Labour Court, I do not find any wrong test of law is applied by the Labour Court. I find that the judgment of the Labour Court is consistent with the evidence. In fact the Labour Court has rightly held that there is no evidence that co-worker was assaulted by the charge sheeted

workman Non production of any material or record regarding medical treatment, undertaken by the alleged assaulted worker makes it clear that charge of misconduct of assault is not established. The learned counsel for the respondent has contended that the documentary evidence in the form of complaint was produced and the same corroborated by the evidence of co-worker. In so far as aforesaid contention is concerned, I am of the opinion that mere complaint does not establish any charge of assault on co-worker. Complaint is made in beginning and in fact the statements made in the complaint must be established and proved by leading necessary evidence. It is admitted on the record that no documentary evidence has been produced for the charge of so called assault. The case that the person was treated by Dr. Gaikwad of Vikroli also does not inspire any confidence when the co-worker is working in a hospital where round the clock doctors are available. Even the evidence of the co-workers has been found to be contradictory and on occasions the said oral evidence has not stood the test of cross

examination. In the light of the matter, in my opinion, the Labour Court was right and justified in coming to the conclusions which it has come on the material before him and the Industrial Court has erred in interfering with the said findings by appreciating and re-appreciating evidence and coming to the different conclusions. In the light of the aforesaid discussion, in my opinion the order of Industrial Court dated 18th March, 2002 in Revision Application (ULP) No. 43 of 2001 is unsustainable in law and the same is required to be set aside. Accordingly, Writ Petition No. 3108 of 2002 is made absolute. The Industrial Court order dated 18th March, 2002 passed in aforesaid Revision Application No. 43 of 2001 is quashed and set aside and order of 12th Labour Court in Complaint (ULP) No. 283 of 1987 is restored. However, in view of the fact that after the order passed by the Labour Court, the worker has expired on 19th January, 2002, I modify the said order of the Labour Court as under - "that the respondent no.1 will treat the deceased workman in service upto the date of his death or the date of

superannuation, whichever is earlier and pay his dues accordingly with full backwages.

10. Writ Petition No. 1132 of 2003 preferred by the Management is dismissed.

11. However, there shall be no orders as to costs.

12. The learned counsel for the respondent seeks stay of the order for a period of six weeks. Stay granted.

[S. U. Kamdar, J.]